134-178

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1539.

THOMAS JEFFERIES, APPELLANT,

vs.

THE EAST OMAHA LAND COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED JANUARY 11, 1890.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JANUARY 13, 1889.

1 Pleas before the Honorable David J. Brewer, judge of the circuit court of the United States for the eighth circuit and district of Nebraska, at the term of November, 1889.

Be it remembered that on the 9th day of February, 1889, a bill was filed in the office of the clerk of said circuit court; which said bill is in words and figures following, to wit:

In Equity.

To the honorable the judges of the circuit court of the United States for the district of Nebraska:

The East Omaha Land Company, a corporation organized and existing under the laws of the State of Nebraska and a citizen of said State, brings this its bill of complaint against Thomas Jefferis, of the city of Council Bluffs, in the State of Iowa, and a citizen of said State.

And thereupon your orator complains and says:

I. Your orator is and for two years last past has been a corporation organized and existing under the laws of the State of Nebraska, and is and for that time has been a citizen of said State, and the defendant is a resident of the city of Council Bluffs, in the State of Iowa, and a citizen of said State, and the lands which are the subject of this your orator's bill are of the value of $2,000 and more.

II. In 1851 the deputy surveyors of the United States, then engaged in surveying the public lands in township seventy-five (75) north, of range forty-four (44) west, of the fifth principal meridian, in the State of Iowa, ran, marked, and made field-notes and plats on the meander line of the left bank of the Missouri river, and returned the said field-notes and plats to the surveyor general of

2 Iowa, who filed the same in the General Land Office, and the same were thereupon duly approved, nor since that time has any resurvey of the lands lying along, upon, or near said river or of the premises which are the subject of this your orator's bill ever — made by the United States.

Section twenty-one, in said township, was properly surveyed and subdivided by said deputy surveyors, and the plats and notes thereof were duly made, returned, and approved as aforesaid. By the said surveys of said section — was found and by the plats and notes thereof returned as fractional and a part thereof designated as lot four (4) was formed, the north boundary thereof being on the Missouri river, containing thirty-seven and twenty-four one-hundredths (37.24) acres. The meander line of the river was described in said field-notes as beginning at meander corner number six, the same being at a point on the line between sections sixteen and seventeen, in said township and range, about one hundred feet north of the intersection of the exterior lines of said sections sixteen and seventeen and sections twenty and twenty-one (20) and (21); thence south seventy-one (71) degrees east two chains and sixty-eight hundredths (2.68) to meander post number seven (7) on the north line of the said lot four (4); thence south seventy-nine degrees and fifty minutes east

(79 50') fifty-four (54) chains; thence north eighty-five degrees east (85 E.) four and fifty-hundredths chains (4.50); thence east fifteen chains (15); thence north eighty-seven degrees east (87 E.) five and twenty-five hundredths (5.25) chains to the corner of sections twenty-one (21) and twenty-two (22), in said township and range. Hereto annexed and made a part of this your orator's bill, marked "Exhibit A," is a true copy of the plat made, returned, and approved as aforesaid, showing the meander line of said river and the lines of the subdivisions of said sections seventeen, sixteen, twenty-one, and twenty-two.

3 III. On the 10th day of October, 1853, one Edmund Jefferis entered the said lot four (4) at the United States land office for the district of land subject to sale at Kanesville, in said State, and paid the proper officer of said office the legal price thereof and received therefor the usual register's certificate, and on the 15th day of June, 1855, the usual patent of the Government was duly issued to him for said land. In the said certificate and patent the said lands were described as lot four (4), in fractional section twenty-one (21), in township seventy-five (75) north, range forty-four (44) west, of the fifth principal meridian, containing thirty-seven and twenty-four hundredths acres, according to the official plat of the survey of said land returned to the General Land Office by the surveyor general; and your orator is informed and believes that at the time of said entry the meander line of the left bank of said river was the same or nearly the same as shown by the field-notes and on the plat above mentioned.

IV. On the 14th day of July, 1856, the said Jeffries duly conveyed said lands to Joseph Still and Joseph I. Tower, describing the same simply as lot four (4), in section 21, in township 75 north, range 44 west, of the fifth principal meridian.

On the 21st of September, 1857, the said town conveyed, with warranty, to Thomas McCoid the undivided half of the said premises.

On the 16th of October following the said McCoid quitclaimed the said premises to Horace B. Coleman.

On the 25th of May, 1858, the said Coleman conveyed the said premises, with warranty, to Mrs. Ruth A. Town.

On the 27th of April, 1859, the said Joseph A. and Ruth A. Town conveyed the said premises, with warranty, to William S. Boin, Jr.

On the 30th of May, 1861, the said Boin quitclaimed the said premises to Edward McBride.

4 On the 30th of September following the said McBride quitclaimed the said premises to Hiram S. Schoville.

The said Schoville having died on the 14th of August, 1878, on the 22nd of March, 1888, his widow and heirs quitclaimed the said premises to plaintiff.

On the 9th of March of the same year the said Still quitclaimed the other undivided half of the said premises to Lyman H. Tower, who, on the 28th of March, conveyed the same to plaintiff.

In each of the deeds made by the several parties in that behalf the said premises were described as lot four (4) of fractional section

21, township 75 north, range 44 west, of the 5th principal meridian, and at or about the day of the dates of the said deeds, respectively, the same were duly recorded in the registry of Pottawattamie county, Iowa, in which county the said premises were situate.

V. About the time of the original entry of said lot four (4) by said Edmund Jeffries along and against the whole length of the north line thereof new land was formed and from that time continued to form until 1870, so that in that year, at a distance of twenty chains and more from the original meander line above described and within the lines on the east and west of said lot, running north and south, a tract of forty acres and more had been formed by accretion to said lot, and ever since had been and now is a part thereof. The said lands were so formed by natural causes and imperceptible degrees—that is to say, by the operation of the current and waters of said river washing and depositing against and upon the north line of said lot, earth, sand, and other material, and the waters and current of said river receded therefrom, so that the new land formed as aforesaid became high and dry and above usual high-water mark and made for itself its main course far north of the original
5 meander line, and the said process, begun in 1853, continued to 1870, went on so slowly that it could not be observed in its progress, but at intervals of not less than three or more months it could be discerned by the eye that additions greater or less had been made to the shore.

In 1877 the said river, at a point more than a mile south of the north line of said lot, suddenly cut through its bank and made for itself a course through the same, leaving all of said section twenty-one (21) north of its bank. Hereto annexed is a plat, marked "Exhibit B," upon which is delineated the said river before and also after the said sudden change thereof.

VI. The said river is and always has been navigable for steamers of large tonnage. The United States had never claimed any interest in the land so as aforesaid formed by accretion to said lot four (4), and your orator submits that by the said several mesne conveyances whereby the title to said lot four (4) has come to it as hereinbefore stated it has become seized in fee not only of the lands included within its boundaries at the time of the aforesaid survey thereof, but also of the land formed as aforesaid by accretion thereto, so that its east and west boundaries are formed by the protraction of the east and west lines north to left bank of said river, as the same was when, in 1876, it suddenly changed its course, and its north boundary is the said left bank at that time.

VII. When your orator became seized of said lands it entered into the same and made large and valuable improvements thereon and has projected the enterprise of redeeming said lands and others adjoining the same and improving the same so that they will be available for railroad and manufacturing purposes and of building railroad tracks, station-houses, depots, warehouses, and manufacturing establishments, and selling parcels thereof to others for such purposes, and has expended large sums, exceeding $20,000, and has in hand $100,000 which it purposes to expend in grading and in
6 building roads, bridges.

VIII. In the summer of 1888 one Cal. P. Counzeman and others, without any authority of law, entered upon the lands so as aforesaid formed by accretion and for a time occupied the same, but afterwards abandoned them, and recently the said Counzeman has made to the defendant a deed of quitclaim purporting to convey a certain parcel of said land so as aforesaid formed by accretion to said lot four (4). The south line of said lands so conveyed to said defendant is about two hundred feet north of the original meander line of said lot as the same was run, marked, and platted by the United States surveyors, as hereinbefore stated, and purports to convey about twenty (20) acres. Your orator is not informed of the particular description of the premises intended to be conveyed as aforesaid and cannot set forth the same with more precision, but he says that the said premises are within the above-recited boundaries of the lands formed by accretion to said lot four (4).

When the said Counzeman entered upon said lands and when he made the said deed to said defendant each of them well knew of your orator's plan and purposes in respect thereof and that they had no right to enter into the said lands, and the said defendant threatens to, and unless restrained by the order and injunction of your honors he will, enter said lands and dispossess your orator and seriously interfere with its plans and purposes as aforesaid.

The said defendant is insolvent and unable to answer to your orator for the loss, injury, and damage to which he will subject it by entering into and dispossessing your orator of the said premises.

And your orator well hoped that the said defendant would desist from the acts threatened by him as aforesaid, as in equity and good conscience he ought to have done.

7 All which actions and doings are contrary to equity and good conscience and tend to the manifest wrong, injury, and oppression of your orator in the premises.

In tender consideration whereof and forasmuch as your orator is without adequate remedy at and by the strict rules of the common law and can only have relief in a court of equity where matters of this and the like nature are properly cognizable and relievable—

To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief herein prayed and may answer this your orator's bill according to the course and practice of the court, but not under oath, his answer under oath being hereby expressly waived, and that he be, by the order and injunction of your honors, enjoined and restrained from entering into, taking possession of, or in any manner intermeddling with the premises pretended to have been conveyed to him by the said Counzeman or any part thereof, and that it be declared by the decree of your honors that the lands formed in manner aforesaid against the said lot four (4), including those conveyed to said defendant as aforesaid, became and were a part of said lot and included within such its description and the title thereto has become and is vested in your orator, and that it be decreed that the deeds

made to said defendant be delivered up to be canceled, and that he be perpetually enjoined from asserting the same or any part, right, title, or interest thereunder against your orator, and that your orator have its costs of this suit and all such other and further relief as the circumstances of this case require and is agreeable to equity and good conscience—

May it please your honors to grant unto your orator not only the writ of injunction issuing out of and under the seal of this
8 honorable court, directed to the said defendant, Thomas Jefferis, enjoining and restraining him as hereinbefore prayed, but also the usual writ of subpœna, issuing in like manner and directed to the said defendant, commanding him that at a day therein to be inserted he be and appear in this honorable court, then and there to answer this your orator's bill and stand to, perform, and abide such order and decree in the premises as to your honors shall seem meet and equitable.

And your orator will ever pray, &c.

C. J. GREENE,
Solicitor for Complainant.

J. M. WOOLWORTH,
Of Counsel.

Attached to said bill are Exhibits "A" and "B" as follows:

(Here follow diagrams marked pp. 9 & 10.)

11 Upon the back of said bill appear endorsements in words and figures following, to wit: No. 347, M. United States circuit court, district of Nebr. East Omaha Land Co. *vs.* Thomas Jeffries. Bill. Filed Feb. 9, 1889. Elmer D. Frank, clerk.

Thereupon afterwards, to wit, on the 20th day of February, 1889, demurrer to bill was filed in said case; which said demurrer is in words and figures following, to wit:

In the United States Circuit Court, District of Nebraska.

The Demurrer of Thomas Jefferis, Defendant, to the Bill of Complaint of The East Omaha Land Company, Plaintiff.

This defendant, by protestation not confessing or acknowledging all or any of the matters and things in said plaintiff's bill to be true in such manner and form as the same are therein set forth or alleged, doth demur thereto and for cause of demurrer shows that the said plaintiff has not in and by its said bill made or stated such a case as doth or ought to entitle it to any such discovery or relief as is hereby sought or prayed for from or against this defendant. Wherefore this defendant demands the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill or any of the matters and things therein

contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

FINLEY BURKE,
Solicitor for Defendant.

DISTRICT OF NEBRASKA, *ss:*

Finley Burke, being duly sworn, says that the above demurrer is not interposed for delay; that this deponent is the solicitor for demurrant in the said demur.

FINLEY BURKE.

Subscribed and sworn to before me this — day of February, 1889.

——.

12 On the back of said demurrer appear endorsements in words and figures following, to wit: No. 347, M. U. S. circuit court, district of Nebraska. East Omaha Land Company *vs.* Thomas Jefferis. Demurrer to bill. Filed Feb. 20, 1889. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 1st day of March, 1889, opinion was filed in said case; which said opinion is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

EAST OMAHA LAND COMPANY
vs.
THOMAS JEFFRIES.

Opinion.

BREWER, *C. J.:*

This is a bill filed by the complainant to quiet its title to a tract of about twenty acres, which lies in what was at one time the bed of the Missouri river. Complainant claims that the premises in question were formed by accretions against land, title to which he derives through several mesne conveyances from the person who originally entered the same, and that by accretion the new land became a part of that which was bought of the Government. The facts alleged are that in 1851 the United States, in surveying township 75 north, range 44 west, in Iowa, found section 21 to be fractional and subdivided it so as to produce lot four, containing 37.44 acres. Field-notes and plats were duly made, returned, and approved in the General Land Office. They show the meander line of lot four, its course and distances, the north boundary of the lot being the Missouri river, along whose banks this meander line was run.

In 1853 one Edward Jeffries entered this lot and in '55 a patent was issued to him. The complainant claims title by mesne
13 conveyances from Jeffries, the last deed, the deed to complainant, being dated March 26, 1888. The meander line was the same or nearly the same when Jeffries entered the land as

when the survey was made, but about the time of the entry land began to be formed along the bank by natural causes and imperceptible degrees—that is, by the current and the waters of the river washing and depositing against and along the north line of said lot earth, sand, and other material, so that by 1870 a tract of forty acres and more had been formed by accretion. In 1877 the river suddenly cut through its banks on a point more than a mile south of its original bed and changed its course so as to leave high and dry all the region through which it had flowed from '55 to '77.

The case is before the court upon demurrer to the bill, and the question is whether this body of land formed by this gradual and imperceptible addition belonged to the owner of lot four and passed by the several conveyances of lot four to complainant. Counsel for defendant challenged the application of the doctrine of accretion to the change caused by the Missouri river. I shall not consider that question, but assume that the doctrine of accretion applies here as well as elsewhere. He also criticises the language of the bill, which alleges that when the land was entered the left bank was nearly where it was in '51, when the survey was made. I pass that by also and assume for the purposes of this case that the doctrine of accretion applies, and that Edward Jeffries when he entered the land took all the land to the Missouri river. Complainant insists that the meander line is not the line of boundary, and that this is so is settled by the case of The Railway Company *vs.* Schurmeir, 7 Wallace, 272. I quote the language of the court:

"Express decision of the supreme court of the State was that the river in this case and not the meander line is the west boundary of the lot, and in that conclusion of the State court we entirely concur.

Meander lines are run in surveyed fractional portions of the public lands bordering upon navigable rivers not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream and the means of ascertaining the quantity of the land in the fraction subject to sale and which is to be paid for the purchaser.

In preparing the official plat from the field-notes the meander line is represented as the border line of the stream, and shows to a demonstration that the water-course and not the meander line as actually run on the land is the boundary." In that case the meander line ignored a tract of 2.78 acres, which in time of high water was an island, but in time of low water connected with the main land, and it was held by the supreme court that the patent from the Government of the fractional lot adjoining took this tract as a part, although outside of the limits of the meander line.

But the question in this case lies deeper than this. It is not what belongs by the law of accretion to the owner of lot four, but what passes by a deed of lot four, and it is insisted by counsel for defendant that the patent took only to the river line as it stood when the survey was made and that every subsequent deed describing the property only as lot four conveyed no more. In other words, he insists that land which is formed by accretion does not pass by a con-

veyance describing the lands to which the accretion has been made, and in this proposition I think he is correct. In the case of Granger *vs.* Schwartz, 1 Wool., 88, Mr. Justice Miller, of this circuit, charging the jury, held that a patent for a fractional lot carried the ground to the river bank as it was at the time the survey was made, but that if between the time of the survey and the time of the entry a
15 body of land had been formed by accretion it remained the property of the Government and did not pass by the entry and patent. The same doctrine seems to have been recognized by the supreme court of this State in Lammers *vs.* Nisson, 4 Neb., 245; Bissell *vs.* Fletcher, 28 N. W. Rep., 303. But for this court the question seems to be put at rest by the decision of the Supreme Court of the United States in the case of Janes *vs.* Johnson, 18 Howard, 150, which involved a question as to lands in the city of Chicago bordering on the lake. I quote this from the opinion:

"Now, one answer to this assumption is that a grantee can acquire by his deed only the lands described in it by metes and bounds and with sufficient certainty to enable a person of reasonable skill to locate it, and cannot acquire lands outside of the description by way of appurtenance or accession."

Lord Coke says: "A thing corporeal cannot properly be appurtenant to a thing corporeal nor a thing incorporeal to a thing incorporeal." Coke Litt., 121, B.

And this court, in Harris *et al. v.* Elliott, 10 Pet., 54, after approving of the maxim of Coke, observed that according to this rule land cannot be appurtenant to land. In the case of Jackson *vs.* Hathaway, 15 Johns. R., 454, the court say: A mere easement may, without express words, pass as an incident to the principal object of the grant, but it would be absurd to allow the fee of one piece of land not mentioned in the deed to pass as appurtenant to another distinct parcel which is expressly granted by precise and definite boundaries." See also 7 Mass., 6.

And again—

"Any alluvial accretions since the deed belong to the plaintiff as owner of the adjoining land and past accretions belong to the then owner, and whoever sets up a title to them must show a deed of the same as in the case of any other description of land."

16 The case of Robert M. Lamb *vs.* Thomas C. Rickets, 11 Ohio, 311, exemplifies the principle for which we are contending. The defendant has agreed to convey a piece of land called the Hamlin lot, containing forty-two acres, more or less, and also two other small lots of ten acres, with a proviso if the Hamlin lot and the two others contained more than fifty-two acres the excess was reserved. The defendant conveyed the Hamlin lot and refused to convey the other two. A bill was filed to compel a conveyance.

The Hamlin lot was bounded by one of its lines on the bank of the Tuscarawas river, and had been originally conveyed to the defendant and by him to the plaintiff as containing forty-two acres, more or less.

The defence set up to the bill was that before the defendant conveyed the lot to the plaintiff large accessions had been made from

the river to the lot, and that these alluvial formations made up the quantity of fifty-two acres.

The plaintiff claimed that the quantity should be determined according to the old boundary of the lot upon the bank of the river, which would be some forty-two acres. But the court held that the question was not as the bank of the river was twenty-five or thirty years ago, but as it was when the Hamlin tract was conveyed to the plaintiff, and estimated the quantity of land conveyed accordingly.

As I read this opinion of the supreme court it asserts this doctrine, that while alluvial accretions belong to the owner of the adjoining land, they do not pass by the conveyance of that land; in other words, if the owner of lot four in the case at bar became through accretions the owner of 40 acres adjacent, his conveyance of lot four carried the lot as it stood and not the forty acres of which he had become the owner by the matter of accretions.

17 If he intended to convey this additional tract, by apt language he should describe it. His conveyance is limited to that which he described, although it may be true that the boundaries of lot four are not the meander line as run by the surveyors, but the bank of the river as it stood when the surveys were made. If he wished to convey that which had formed since and which had become his through accretions he should by apt words describe this added land which he purposed to convey. Not having conveyed these accretions, they remain his. The complainant's title is limited to lot four; that lot was bounded by the river line at the time of the survey and the entry. The land outside of that it has never purchased; that is the land in controversy. To it the complainant has no title, and the demurrer must be sustained.

Upon the back of said opinion appear endorsements in words and figures following, to wit:

No. 347, M. U.S. circuit court, district of Nebraska. East Omaha Land Co. *vs.* Thomas Jeffries. Opinion. Filed Mar. 1, 1889. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 12th day of November, 1889, stipulation was filed in said case; which said stipulation is in words and figures following, to wit:

Stipulation.

In the United States Circuit Court, District of Nebraska.

THE EAST OMAHA LAND COMPANY, Plaintiff,
vs.
THOMAS JEFFERIS.

It is hereby stipulated by and between the parties to the above-entitled cause that the application for a rehearing may be

18 submitted on the bill, demurrer, and argument, either printed or oral, as either party may see fit.

WOOLWORTH & GREENE,
Solicitors for Plaintiff.
FINLEY BURKE,
Solicitor for Defendant.

Upon the back of said stipulation appear endorsements in words and figures following, to wit: No. 347, M. U. S. C. C., dist. of Nebr. East Omaha Land Co. *vs.* Thomas Jefferis. Stipulation. Filed Nov. 12, 1889. Elmer D. Frank, clerk. From the office of Finley Burke, counselor, &c.

Thereupon afterwards, to wit, at the November term of said court, on the 12th day of November, 1889, the following proceedings were had and done in said cause, as appears of record on folio —, Journal N of said court, to wit:

EAST OMAHA LAND COMPANY
vs.
THOMAS JEFFERIS. } Cause Submitted. 347, M.

This cause coming on for hearing on the petition of the complainant for a rehearing herein was argued and submitted to the court by solicitors for the respective parties, whereupon the court takes the same under consideration.

Thereupon afterwards, to wit, on the 13th day of December, 1889, opinion was filed in said cause which said opinion is in words and figures following, to wit:

Opinion.

In the Circuit Court of the United States for the District of Nebraska.

EAST OMAHA LAND COMPANY
vs.
THOMAS JEFFERIS.

19 BREWER, *C. J.:*

This case was submitted to me last winter on demurrer to the bill. On examination of the question it seemed to me that the demurrer was well taken, and I accordingly prepared an opinion sustaining it. An application for a rehearing was filed and the case is before me now on such application. For the facts of the case I refer to the former opinion.

The first question is whether the doctrine of accretion applies. In my former opinion I assumed that it did, but that assumption is strongly challenged by counsel for defendant.

While the allegation in the bill is of an imperceptible increase, one of the characteristics and tests of accretion, yet counsel urge that I am bound to take judicial notice of the character of the Missouri river and the soil through which it flows and of the rapid

changes in the banks which are constantly going on, and also that the extent of the total increase as disclosed by the bill is so great as to forbid the idea of that neccessary imperceptible increase. I cannot assent to this. While it is true the increase is great, many acres having been added, yet the time during which this increase was made was nearly twenty years, and obviously during that time an increase might be going on, imperceptible from day to day and from week to week, which, during the lapse of these many years, would result in the addition of all the land as alleged. Hence, notwithstanding what is known of the character of the river and the soil through which it flows, no conclusions flowing therefrom can overthrow the plain averments of the bill.

Passing now to the question which I ruled in favor of the defendant, I am constrained to believe that I erred therein.

It was held that a deed to lot four conveyed lot four only
20 as it existed at the time of the survey, and that all accretions remained the property of the prior owner unless expressly named in the deed. The ruling was based principally upon the case of Jones *vs.* Johnson, 18 How., 150, and singularly it is that case which after reargument and re-examination leads me to change my opinion.

Section 2396 of the Revised Statutes provides how the boundaries and contents of the several sections, half sections, and quarter sections of the public lands may be ascertained.

"SECTION 2396. The boundaries and contents of the several sections, half sections and quarter sections of the public lands shall be ascertained in conformity with the following principles:

First. All corners marked in the surveys returned by the surveyor general shall be established as the proper corners of sections or subdivisions of sections which they were intended to designate, and the corners of half and quarter sections, not marked on the surveys, shall be placed as nearly as possible equidistant from two corners which stand on the same line.

Second. The boundary lines actually run and marked in the surveys returned by the surveyor general shall be established as the proper boundary lines of the sections or subdivisions for which they were intended, and the length of such lines as returned shall be held and considered as the true length thereof, and the boundary lines which have not been actually run and marked shall be ascertained by running straight lines from the established corners to the opposite corresponding corners, but in those portions of the fractional townships where no such corresponding corners have been or can be fixed the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the water-course, Indian boundary line, or other external boundary of such fractional township.

21 Third. Each section or subdivision of section the contents whereof have been returned by the surveyor general shall be held and considered as containing the exact quantity expressed in such return, and the half sections and quarter sections the contents whereof shall not have been thus returned shall be held and con-

sidered as containing the one-half or the one-fourth part, respectively, of the returned contents of the section of which they may make a part."

Obviously, then, in surveying land bordering upon a river the opposite corners of the quarter sections are fixed and the side lines are extended from these corners parallel with each other until they meet the water-course, and that water-course and not any line that is run along it becomes the boundary. This was settled by the case of The Railway Company *vs.* Schurmeir, 7 Wallace, 272.

Now, in the case in 18 How., *supra*, the court held that land outside of fixed lines, boundaries of a tract, could not be appurtenant to it, quoting Lord Coke to the effect that a thing corporeal cannot properly be appurtenant to a thing corporeal.

The lots in that case, as shown by the plat, were bounded on the north by North Water street and were included within lines dropped from fixed corners on that street at right angles with the same and extended until they intersected the lake shore. Now, it was with reference to accretions formed at these side lines that the court used the language referred to. The side lines being definite and fixed, run at right angles to North Water street, were and continued to be the boundaries of the lots named, no matter what accretions formed outside those lines; and in further illustration of this was the language used which I quoted in the former opinion. But while this was laid down as the rule for accretions formed outside of the fixed side lines, a different rule was stated in reference to land formed by accretions at the end of the lot where the water front was the boundary. It affirmed that where the water line
22 was the boundary it remained the boundary no matter where that line might be. Thus this language is used:

"Now, in order to determine what land was conveyed to the plaintiff by his deed of 22nd October, 1885, all that was necessary was to locate the lot upon the ground in conformity to the description at that date. The calls in the deed having reference to the plat furnished the necessary data for the location. There was the fixed line north on the ground, the lake, a natural object, south, and the lot enclosed between two lines extending at right angles from the corners on Water street to the lake.

If the call for the southern boundary, instead of being a lake, which is a shifting line, had been a permanent object, such as a street or wall, there could not be two opinions as to the location; and yet the water line, though it may gradually and imperceptibly change, is just as fixed a boundary in the eye of the law as the former. I speak not now of sudden and considerable changes, which are governed by different principles."

And again:

"But the true answer to the position assumed and which governed the trial below is that the water boundary on the lake is to be deemed the true southern boundary of the lot at the date of the conveyance, as much so as North Water street was its northern boundary; and the plaintiff is carried by his deed to it, not because of the alluvial deposit, if any, between the water line at the time of

the survey and plat and the line at the date of the deed having passed as appurtenant to the lot, but because one of the calls given in the deed requires that the side lines should be thus extended."

In other words, the Supreme Court seems to have laid down this proposition, that where a water line is the boundary of a named lot that line remains the boundary no matter how it shifts,
23 and a deed describing the lot by number or name conveys the land up to that shifting line exactly as it does up to the fixed side line.

Supporting this doctrine are the cases of—

Lamb *vs.* Ricketts, 11 Ohio, 311.
Giraud's Lessee *vs.* Hughes, 1 Gill & Johnson, 249.
Kraut *vs.* Crawford, 18 Iowa, 549.
Grover *vs.* Shields, 32 Barbour, 374.

And, independent of authority, any other rule would be attended with great, if not insurmountable, practical difficulties.

Supposing a chain of title to this very lot—lot four—in which during a succession of years there appears every two or three weeks a conveyance; the boundary on the river is gradually extending, but extending so slowly that during the time of possessions of any grantor the increase would be imperceptible.

How, then, can the portion thus reserved be distinguished from the portion conveyed? It is true that between the time of possession of the patentee and the last grantee the change becomes evident, but is there any reason why all this increase should belong to the patentee and not be distributed among the various holders in the chain of title? And how can it be distributed? This practical difficulty in the application of the rule announced in the former opinion has led to a careful re-examination of the question in the light of the authorities, and especially of the case in 18 Howard, and I am compelled to hold that there was error in the former opinion. The true rule is that so long as the doctrine of accretion applies the water line, if named as the boundary, continues the boundary no matter how much it may shift, and the deed of the lot carries all to such line.

The petition for a rehearing must be sustained and the demurrer to the bill will be overruled.

Upon the back of said opinion appear endorsements in
24 words and figures following, to wit: No. 347, M. U. S. circuit court, district of Nebraska. East Omaha Land Co. *vs.* Thomas Jeffries. Opinion. Filed Dec. 13, 1889. Elmer D. Frank, clerk.

Thereupon, afterwards, at the November term of said court, on the 13th day of November, 1889, the following proceedings were had and done in said cause, as appears on Journal N of said court, to wit:

THE EAST OMAHA LAND COMPANY
vs.
THOMAS JEFFERIS.
} 347, M. Decree.

This cause came on to be heard upon the plaintiff's petition for a rehearing of the demurrer to the bill, and was argued by Mr. Woolworth and Mr. Greene, in support of the said petition and against said demurrer, and by Mr. Burke, in opposition to the said petition and in support of the said demurrer; and thereupon it is ordered that the said petition for rehearing be, and the same is hereby, sustained and the said demurrer be, and the same is hereby, overruled.

And thereupon it is ordered, adjudged, and decreed that the said defendant, his agents, attorneys, solicitors, and counsellors, be, and they are hereby, perpetually restrained and enjoined from entering into, taking possession of, or in any manner intermeddling with the premises hereinafter described and from asserting any right or interest thereto, and that the usual writ of injunction be issued out of this court, directed to the said defendant, his agents, attorneys, solicitors, and counsellors, commanding and enjoining them as hereinbefore set forth.

And it is hereby declared that the said lands were formed by process of accretion and imperceptible degrees against the premises known and described as lot four (4) of section twenty-one (21), in township seventy-five (75) north, of range forty-four (44) west, of the fifth (5th) principal meridian, in the State of Iowa, as the same were originally surveyed and platted by the surveyors of the United States, and became by such accretion a part of said lot and were included within such description, and the title thereto passed by such description from the original patent of the United States to the said plaintiff by divers mesne conveyances and is now vested in the said plaintiff; and it is hereby ordered, adjudged, and decreed that the deed made to said defendant by Cal. P. Counzeman, purporting to convey the premises hereinafter described, be by the said defendant delivered up to said plaintiff to be cancelled, and that the plaintiff have its costs of this bill, to be taxed.

The premises hereinafter referred to are known and described as follows:

Beginning at a point fifteen hundred and twenty (1,520) feet north of the southwest corner of lot four (4), in section twenty-one (21), township seventy-five (75) north, range forty-four (44) west, of the fifth (5) principal meridian, running thence north six hundred and sixty (660) feet; thence east thirteen hundred and twenty (1,320) feet to the extension due north of the east boundary line of said lot four (4), as originally surveyed and platted by the United States; thence south on said line six hundred and sixty (660) feet; thence west to the place of beginning, containing twenty (20) acres.

Thereupon the defendant prays an appeal to the Supreme Court, which is allowed, and his bond for costs is fixed at $250.00.

(S'g'd) DAVID J. BREWER,
Circuit Judge.

We do not object to the form of the above decree.

J. M. WOOLWORTH,
Of Counsel for Pl'ff.
FINLEY BURKE,
For Defendant.

26 Know all men by these presents that we, Thomas Jefferies and Finley Burke, are held and firmly bound unto the East Omaha Land Company in the full sum of two hundred and fifty ($250) dollars; to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Dated at Council Bluffs, January 5th, 1890.

Whereas lately, at a circuit court of the United States for the district of Nebraska, in a suit depending in said court between The East Omaha Land Company, plaintiff, and Thomas Jefferies, defendant, a decree was rendered against the said Thomas Jefferies, who thereupon prayed an appeal to the Supreme Court of the United States, which appeal was allowed by said circuit court: Now, the condition of the above obligation is such that if the said Thomas Jefferies prosecute his appeal to effect and answer all costs if he fail to make his said appeal good, then the above obligation is void; else to remain in full force and virtue.

THOMAS JEFFERIS,
By FINLEY BURKE,
His Solicitor.
FINLEY BURKE, *Surety.*

Approved Jan. 7, 1890.
ELMER S. DUNDY, *Judge.*

This is satisfactory to me.

J. M. WOOLWORTH.

Upon the back of said bond appear endorsements in words and figures following, to wit: No. 347, M. U. S. circuit court, district of Nebraska. The East Omaha Land Company *vs.* Thomas Jefferis. Bond. Filed Jan. 7, 1890. Elmer D. Frank, clerk.

27 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

I, Elmer D. Frank, clerk of the circuit court of the United States for the district of Nebraska, certify that the foregoing folios, from one to 27, contain true and faithful transcripts of the pleadings and proceedings of record and on file in my office as such clerk, and the

whole thereof and the endorsements thereon, in the case of East Omaha Land Company *vs.* Thomas Jefferies.

Witness my hand and the seal of said court, at Omaha, this 28th day of December, A. D. 1889.

Seal United States Circuit Court, District of Nebraska.

ELMER D. FRANK, *Clerk.*

Endorsed on cover: Nebraska C. C. U. S. No. 1539. Thomas Jefferies, appellant, *vs.* The East Omaha Land Company. Filed January 11, 1890.

Office Supreme Court U. S.
FILED.
JAN 13 1890
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

THOMAS JEFFRIES,

Appellant,

vs.

THE EAST OMAHA LAND CO.

BRIEF FOR APPELLANT.

FINLEY BURKE,

Of Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

THOMAS JEFFRIES,

Appellant,

vs.

THE EAST OMAHA LAND CO.

BRIEF FOR APPELLANT.

This is a bill in equity to quiet title to the land in dispute.

The appellant filed a general demurrer, which was argued to His Honor, Judge Brewer, who on the 22d day of February, 1889, filed a written opinion sustaining said demurrer.

Subsequently a re-hearing was had and upon the re-submission of said demurrer, it was overruled.

Defendant standing on his demurrer, decree was rendered against him in accordance with the prayer of the bill.

It is from the ruling upon the demurrer that this appeal is prosecuted.

The facts as disclosed by the bill are as follows:

In 1851 the United States surveyed township seventy-five (75) north, range forty-four (44) west, in the State of Iowa, and in said survey formed the fractional section

twenty-one (21), which was subdivided, making lot four (4) containing thirty-seven and twenty-four (37.24) hundredths acres.

Field notes and plats were duly made, and returned to and approved by the General Land Office. They show the meander line of lot four (4), its course and distances.

On the 10th of October 1853, one Edmund Jeffries entered this lot at the United States Land Office, and on the 10th of June 1855, a patent was issued to him describing the premises as lot four (4) etc., "according to the official plat of the survey of said land, returned to the General Land Office by the surveyor general."

This bill alleges that at the time of the entry the meander line of the left bank of said river was "the same or nearly the same" as shown by the field notes and on the plat above mentioned.

On the 14th of July, 1856, the said Edmund Jeffries conveyed said lot four (4) to Joseph Sill and Joseph I. Town, and by divers mesne conveyances from them the title to the said lands came to and became vested in the complainant on the 16th of March, 1888, so that it is now duly seized in fee of said lot four (4).

About the time of the entry by Edmund Jeffries, along the whole length of the north line of said lot four (4) new land was formed and from that time continued to form until 1877, so that in that year, north of the original meander line above described, and between the east and west lines of the lot extended north, a tract of more than forty (40) acres was formed north of said lot, and which complainant claims formed to said lot by accretion.

The lands aforesaid were formed "by natural causes and imperceptible degrees." that is to say, by the operation of the current and water of said river washing and depositing against and upon the north line of said lot, earth, sand and other material, and the water and current of said river receded therefrom, so that the new land formed as aforesaid became high and dry, and above usual high water mark; and the river made for itself its main course far north of the original meander line. The process went on so slowly that it could not be observed at any one moment of time, but at intervals of some months it could be discerned by the eye.

In 1877 the Missouri river suddenly changed its course above the point referred to and cut through its bank at a point further up the river, and more than a mile south of the north line of said lot, and made for itself a new course leaving all of section twenty-one (21) north of its banks and on the west side of the river.

A plat is attached to the bill which fairly shows the situation before and also after the sudden change in the river.

It is alleged that the Missouri river is, and always has been navigable in fact for steamers of large tonage.

The complainant claims to own the forty (40) acres of new land by virtue of the conveyances to it, on the ground that they are a part of the original lot four (4) having been formed by accretion within its established boundaries.

When it became siezed of lot four (4), the complainant entered into the same and projected the enterprise

of redeeming these and adjoining lands and improving them, so that they would be useful for railroad and manufacturing purposes, and to this end has expended over twenty thousand ($20,000.00) dollars.

In the summer of 1888 one Counzeman and others entered upon said new formed land, and for a time occupied the same but afterwards abandoned it.

It is further alleged that Counzeman has quit claimed part of said land to the defendant, who will enter into the same and dispossess the complainant and defeat its plans, unless restrained. It is also alleged that defendant is insolvent and unable to answer the damages which complainant may sustain.

The prayer is for an injunction restraining the defendant from intermeddling with the land, and for a decree declaring that the new land formed as aforesaid became a part of lot four (4) by accretion, and that the title thereto has become vested in the complainant by the deed conveying to the complainant said lot four (4).

To the bill in equity alleging these facts the defendant (appellant) filed a general demurrer.

The Circuit Court overruled the demurrer, to which the defendant excepted, and defendant standing on his demurrer a decree was rendered as prayed, and for that ruling and that decree this appeal is prosecuted, and the questions involved arise thereon.

SPECIFICATION OF ERROR.

The Court erred in overruling the defendant's general demurrer to the complainant's bill (R. p.--) for that the

bill fails to show any title in complainant but on its face shows that complainant has no title to the lands in controversy, and shows that said lands do not possess the character of accretion.

The Court erred in rendering its decree in favor of complainant (R. p.—); said decree being erroneous in this, that it was based on the overruling of defendant's demurrer to the bill, and said bill fails to show title in complainant; but on its face shows that complainant has no title to the property in controversy, and that the lands alleged to be accretions have not the character of accretions.

BRIEF.

Defendant contends that the bill is bad for several reasons :

First; Because taking the allegations of the pleader together with those facts in relation to the Missouri river of which a court will take judicial notice, it sufficiently appears that the formation in question is not accretion.

Second; Because taking the allegations most strongly against the pleader we have the right to assume that some area however narrow had formed between the time the survey was made, and the time when the land was entered by the patentee.

Third; Because Edmund Jeffries, by the deed made by him to Sill and Town conveyed only "Lot Four (4)" etc, and also, because while the successive grantees held the title to said lot Four (4), accretions were formed of greater or less extent which have never been conveyed to complainant,—the complainant's deed calling only for lot Four (4) in Section twenty-one (21) etc.

FIRST POINT.

The allegations of the bill taken in conjunction with the known character of the Missouri river, and its bed, enable us to deny that the new formed lands are accretions.

The appellant does not wish to be understood as assuming that the court will take judicial notice of the character of the particular lands in question, but does argue that the court will take judicial notice of the characteristics of the Missouri river.

In the United States vs. Lawton et al, 5 Howard 10-26, it was held that a river which is one of the principal objects in the geography of the country may be judicially noticed.

In Peyroux vs. Howard, 7 Pet. 324, this Court took judicial notice of the ebb and flow of the tide at New Orleans.

The facts in relation to said river are matter of common knowledge. They are shown in public documents, the reports of surveys and soundings made by government authority, and even in the works on geography used in the public schools.

They are also shown by reference to histories and works of travel and description.

They are within the knowledge of all persons living in this region.

Waiving for the present the common and general knowledge of these matters, the bill itself supplies us with such information as is needed for our present purpose.

It appears that between 1851 and 1877 the river moved north a distance of one mile.

It is said that this was done so slowly as to be imperceptible at any one time.

Then suddenly it cut through its banks at a point some miles south but yet further up the river as it then existed and left its old bed and courses and made for itself a new one at this great distance.

These allegations show that this river is one, the changes in whose channel are frequent, rapid and very great. Its course is tortuous and it flows through a wide valley of soft, sandy loam. We also know that at certain seasons of the year it has a very rapid current and large volume. Its waters are turpid with mud and washings from the mountains. Much of the soil of the bed is of that character called quicksand, the particles of which glide easily upon each other, causing large tracts of land to fall into the river, thus cutting and changing its banks. The current of the river impinges first upon one side and then upon the other, so that some times in a single season new land of great extent is formed. The land which is washed away upon one side of the river is usually carried by the current a great distance and then thrown up as a sand-bar upon the other side.

Some care ought to be exercised in applying the doctrine of accretion in such a region. The law on this subject is borrowed from England where it was applied to tidal rivers. It is well known that the rivers of England in which the tide ebbs and flows are rivers in whose banks the changes are very slight and cover a long period of time.

In the case of the Genessee Chief 12, Howard 443, this court declared that the great lakes and other navigable waters of the country, above as well as below the flow of the tide, are navigable in a sense to render them amenable to the admirality jurisdiction. And in

Barney vs. Keokuk, 94, U. S., 324, it was held that the bed of the Mississippi River and its banks to high water mark belonged to the State.

Both of these decisions proceed upon the ground that streams which are navigable in fact are to be deemed navigable in law for those purposes.

This court has not yet held, however, that the doctrine of accretion applies upon streams in which the tide does not ebb and flow.

It must be conceded, however, that the same reasons which led the court to extend the admirality jurisdiction to such waters would authorize the application of the doctrine of accretion to the same streams. At the same time in extending this doctrine to such streams we should not lose sight of the difference in the characteristics of the great interior rivers of North America. The test of whether the doctrine of accretion should apply is whether the land is formed so slowly as to be imperceptible. If the new formation can be discerned the doctrine does not apply.

Imperceptible in this sense does not mean what the eye can not see at any one moment or instant of time, but what is not discernible when the situation at two periods somewhat apart are compared.

In Rex. vs. Yarborough, 3 B. and C., 91, same case affirmed in House of Lords 2, Bligh (N. S.) 147, 1 Dow

(N. S.) 176: The word "imperceptible" was interpreted as follows by the court: "In these passages Sir Matthew Hale is speaking of the legal consequence of such accretion, and does not explain what ought to be considered as accretion, insensible or imperceptible in itself, but considers that as being insensible of which it can not be said with certainty that the sea was ever there.

"An accretion extremely minute, so minute as to be imperceptible, even by known antecedents or limits at the end of four or five years, may become, by a gradual increase, perceptible by such marks or limits at the end of the century, or even of forty or fifty years. * * * And considering the word "imperceptible" in this issue as connected with the words "slow and gradual," we think it must be understood as expressive only of the manner of accretion, as the other words undoubtedly are, and as meaning imperceptible in its progress, not imperceptible after a long lapse of time.

"And taking this to be the meaning of the word "imperceptible" the only remaining point is whether the accretion of this land might properly upon the evidence be considered by the jury as imperceptible.

"No one witness has said that it could be perceived, either in its progress, or at the end of a week or a month.

"One witness, who appears to have twice measured the land, says: "That within the last four years he could see that the sea had receded;" but he could not say how much. The same witness said that "it certainly had receded since he measured it last year;" but he did not say

how much. And, according to his evidence, the gain in twenty-six or seven years was, on the average, about five and a half yards a year. * * * We think the jury might, from this evidence, very reasonably find the increase had not only been "slow and gradual," but also "imperceptible."

Now, while it is true that a case can be imagined where the made land had formed in such a slow and gradual manner as to be accretion and be governed by the law thereof upon the banks of the Missouri River, yet taking the known character of that river in connection with the allegations of the bill, which show affirmatively that this river is one in which the changes are frequent, rapid and great, and that the land in question formed with a rapidity which, in England, would have been contrary to all ideas of accretion, we submit that the bill shows on its face, in connection with the facts of which judicial notice is taken, that the doctrine of accretion does not apply to the land in dispute.

Imperceptible does not necessarily mean what the eye can not see at any one moment, but what is not discernable when the situation at two periods not widely apart is compared.

It would seem to be a great hardship to apply the doctrine of accretion to such changes, where what is formed on one side and lost on the other is transferred so rapidly, and where the land is easily identified as being the quarter section or the fractional lot which, last year, belonged to a neighbor on the opposite side of the stream.

Exact justice would be to give each his own land, and

to let him who loses by the encroachments of the river have back his own whenever the water yields it up.

Can it be possible that in transplanting the law of accretions to the banks of the interior rivers of America it has lost its ancient characteristics, and instead of developing better principles which shall more effectually guard rights of ownrship, it has become an insatiable destroyer of rights?

We have a right to ask that when innovations are attempted upon ancient legal principles, they shall be such as commend themselves to our reason and sense of right.

This court is here definitely asked for the first time to extend the law of accretion in express terms to those great rivers in which the tide does not ebb and flow, but which are navigable in fact, and while I can not say in the face of the two authorities above referred to, that it is not reasonable to hold them navigable for the one purpose as well as for the other, yet it is necessary to proceed with caution in applying the law to the facts and the peculiarities of the river must be taken into account, or else the result will be a change of legal ideas without seeming to change the words of the rule.

The words "slow" and "imperceptible" as understood by a conservative English land owner mean quite different ideas from what they do to an active denizen of Omaha, Nebraska.

The word "slow" as applied to changes in the banks of the Thames from Blackwall to its mouth may have quite a different meaning from that of the same word applied to changes in the Missouri river.

The bill shows a change of a mile in about nineteen years, "imperceptible" at any one moment of time.

The law of accretion can have no application to such changes.

SECOND POINT.

Taking the allegations of the bill most strongly against the pleader we have a right to assume that some area, however narrow, had formed between the original lot four (4) and the river after the date of the survey and before the time when the land was entered.

If so, said strip belonged to the United States, and the accretions, if any, subsequently formed should go to the government.

The right to alluvion depends on contiguity, and the accretions belong to the land immediately adjoining the water, however narrow it may be, or whatever may be the size of the parcel behind it.

Saulet vs. Shepherd, 4 Wallace 502. If at the time the land was sold there was a body of waste land between the meander and the river, such land is not included in the entry, but if the bank at ordinary stages of the water reached the meander it is included.

Granger vs. Swart, 1 Woolworth, (C. Ct.) 88,

It was argued by complainant that this whole question is set at rest by the decision in Railroad Co. vs. Schurmeir, 7 Wallace, 272.

Complainant argues that because the public land laws do not require a meander except to ascertain the area of the fractional subdivision and to define the sinuosities of

the banks that therefore the original lot goes to the river as a boundary no matter how far the river has receeded.

It may be conceded that the true boundary at the time of the survey is not the meander line but is the actual river; and yet it does not follow, if the river has receeded forming a large tract of land between it and the original lot, that a present conveyance of the original lot would include such newly formed land.

In the case of the Railroad Co. vs. Schurmeir last referred to, the question under discussion did not arise, because it was sufficient in that case to determine the boundary at the time of the survey.

In Granger vs. Swart, tried before Mr. Justice Miller, the question did squarely arise and he instructed the jury as above stated.

The most that can be said for the complainant is that in ascertaining lot four (4) he has a right to take beyond the meander, if necessary, to reach the actual river at the time of the meander; but it has been expressly ruled, as before stated, that if new land formed between the date of the survey and that of the entry, it would not go with the lot. Any other construction would give the land of the State to the private individual without compensation.

The answer may well be made that where the meanner line does not coincide with the true bank at the time of the meander, or where the surveyors err in estimating area, the government shall lose or gain the amount of the error, just as it does when a section actually overruns or falls short; but this does not answer the question at issue, which is not one of error, but rather a question of why the

individual should have, without compensation, the tract, great or small, which has formed to one of these fractional lots after the survey and before the entry. He does not get it because he has paid for it. He does not get it on account of any principle of public policy. He does not get it on account of any risk to which he has been exposed of losing by the encroachment of the river. No; the only reason complainant urges is that the court so held in the Railroad Co. vs. Schurmeir, 7 Wall, 272.

In that case the court merely held that the meander was not the boundary at the time of the survey, but the river was such boundary, all of which is perfectly consistent with the contention of defendant.

Suppose that after the survey a large area of land had been thrown up by sudden action of the river, not "slow" and not "imperceptible," between the original lot and the river, and suppose this tract, lacking every feature of accretion, were greater in area than the original lot—would it be held that, because, lying within the extended lines of the fractional lot run to the existing water course, it should pass by the entry and patent of the original lot?

The case of Granger vs. Swart is our authority for contending that it would not.

Again, suppose several fractional lots occur with faces resting on a regular curve in the river, as it ran at the time of the survey, and the river has regularly receded, preserving the curve—how commendable will then be complainant's plan of extending the side lines to the existing river? It is evident that they would intersect, and we must then go into an equitable apportionment, as is done in

dividing alluvion between various adjacent riparian owners. The meander, as actually made by references to meander posts and describing courses and distances, is, in most cases, the only practicable guide in fixing the water course at the time of the survey. It is simply not conclusive because not established by the law as a boundary.

THIRD POINT.

Conceding that the entry of Edmund Jeffries passed from the government to Edmund Jeffries all the land to the river, still the bill fails to show that the deed of Jeffries to Sill and Town by apt words described the land which may have formed between the date of his entry and the date of the deed.

The bill does state that by several mesne conveyances the camplainant acquired the title to lot four (4) in the year 1886.

The bill also states that between 1853 and 1877 some forty (40) acres of land were formed between the lot line and the river line of 1877 but it fails to state that any ot the chain of deeds under and through which complainant claims title, contained descriptive words covering and including any part of these forty (40) acres of added land.

The question is: What passed by the successive deeds of lot four (4) under which complainant claims?

If the land in question is to be regarded as accretion does it pass by a deed describing only the land to which such accretion has been made?

In the case of Granger vs. Swart, 1 Wool, (C. Ct.) 88, Mr. Justice Miller charging the jury held that a

patent for a fractional lot carried the ground to the river bank as it was at the time of the survey, but that if between the time of the survey and the time of the entry a body of land had been formed by accretion, it remained the property of the government and did not pass by the entry and patent.

The same doctrine has been recognized by the Supreme Court of Nebraska in

Lammers vs. Nisson, 4 Neb. 245.

Bissell vs. Fletcher, 28 N. W. Rep. 303.

But the case which is at the same time the strongest authority for this position and also complainant's strongest reliance against it, is,

Jones vs. Johnston, 18 How. 150.

That case holds that a grantee can acquire by his deed only the lands described in it by metes and bounds, and can not acquire lands outside of the description by way of appurtenance.

It also holds that any alluvial accretions since the deed belong to plaintiff, as owner of the adjoining land, and past accretions belong to the then owner, and whoever sets up a title to them must show a deed of the same as in the case of any other description of land.

The reasonableness of this view is shown in several ways. The tracts or parcels of lands have been acquired in different methods, from different sources, forming independent estates.

One was derived by grant or purchase, the other by accretion. The area, boundaries, and other facts concerning the first were fixed and definite before the title to the second began.

The writers on the law of real property, as for instance Washburn, treat title by accretion in an independent chapter under the heading of "Title other than by grant."

Here then we have two separate estates, each with its own origin, title and source, each capable of identification, the one the original tract derived by purchase, the other acquired by accretion and both belonging to the same person.

That the owner may convey either one without the other cannot be questioned.

That he could convey the accretion alone, simply describing it by metes and bounds, there can be no question, and the grantor would retain the title to the original lot without expressly reserving it.

Is the converse true?

If the owner deeds "Lot four (4)" does the accretion, which we will call "Tract A," pass with it? If so it must be because it is an incident or appurtenant, but it is not.

Things corporeal can not be appurtenant to things corporeal, and land can not be appurtenant to land.

Counsel for complainant will say, however, that Jones vs. Johnston holds that you must go to the river for a boundary and that this takes you over the accretion and

includes it, and that Lamb vs. Ricketts, 11, Ohio, 311, holds that the accretions are part of the lot.

In each of these two cases the lot was treated as having a name, by which it was known and called. In the latter case it was the "Hamlin lot" and the agreement set forth in the opinion shows that the parties had bargained with respect to it on the supposition that it might contain more acres than were in the original lot.

In the first of the two cases the name, it is true, was "Lot 34," lying in Kinzie's Addition, and known as Water Lot No. 34, as will more fully appear, reference being had to said plat as recorded, &c, but here you will observe it was the ground *known as* Water Lot 34. It is also necessary to bear in mind that the then grantee of lot 34 in that case was denied any part of the accretion; so that looking to the action of the court the case is an authority for defendant, and especially as the court distinctly lays it down that "any past accretions belong to the then owner, and whoever sets up title must show a deed of the same as in the case of other descriptions." But counsel for complainant will argue this accretion is part of Lot four (4).

Here comes a more difficult phase of the question, yet it is plain that in area the accretion may far exceed the original lot, that the title comes in a wholly different way, that it is a separate estate as it were, that it is susceptible of separate identification, and we may add that by reason of the river making a wide bend or curve the accretion going to the owner of the lot may be so broad in its frontage that it can not be confined by the extended side lines.

It is not part of lot four (4), but belongs to the owner of lot (4) at the time it formed. Counsel will urge, however, that it becomes part of lot four (4) because of the impossi. bility of discerning the formation.

Cognizance is constantly being taken of things not visible to the eye, and even as exact a science as mathatics shuts its eyes while it supposes a circle to be a polygon of an infinite number of sides in order to find a rule for determining the area of the circle, and yet mathamatical truths are the only truths which are susceptible of demonstration. It is not unreasonable to say as soon as sufficient accretion has formed to be visible that such accretion is an independent estate and that a deed of the original lot does not pass title to it. It is a great step in favor of defendant's position to establish that it does not pass as an incident or appurtenant. It is but a step further to say that it does not pass as part of the thing itself, because if it is a part of it there is no sense in a discussion of whether it is appurtenant to it.

Counsel however argued below from the confusion which they imagined might arise from holding that the accretion does not pass, and this seemed to have weight with the circuit judge. If there is any reason for such alarm it will exist anyhow as to all the accretion lying out side of the extended sidelines (and I have shown there may easily be accretion out side the sidelines). But the complete answer is that if defendant's position is correct then there can be no confusion, such as is mentioned, because the accretion formed when Edmund Jeffries owned

lot four (4) and he never having parted with the accretion still owns it with all new accretions formed thereto. If he had conveyed the accretions when he conveyed the lot the grantee would have acquired the future accretions formed while he in turn owned contiguous to the river. If he in turn conveyed the accretions the record would show his deed and would show that he sold to the river. If he conveyed only the lot no complication could arise because he would thereby retain the accretion with the right to any future formations.

Having shown upon authority that the position of appellant is correct, and having attempted to show that it is supported by reason, it only remains to call attention to the fact that by no apt words whatever has the land in controversy been conveyed to the complainant.

The bill of complainant, failing to show that it has any title to the premises, it is no concern of complainant what defendant had done, or is about to do, with respect to the land, and the demurrer should, therefore, have been sustained.

FINLEY BURKE,

Of Counsel for Appellant.

Office Supreme Court U. S.
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SUPREME COURT OF THE UNITED STATES.

THOMAS JEFFRIES,

Appellant,

vs.

THE EAST OMAHA LAND CO.

BRIEF FOR APPELLEE.

C. J. GREENE,
Solicitor for Appellee.

J. M. WOOLWORTH,
Of Counsel.

Ackermann Bros & Heintze Printers, Omaha

SUPREME COURT OF THE UNITED STATES.

THOMAS JEFFRIES,

Appellant,

vs.

THE EAST OMAHA LAND CO.

BRIEF FOR APPELLEE.

This is an appeal against a decree of the Circuit Court for Nebraska. It was a general demurrer to a bill in equity.

The case stated in the bill is this:

In 1851, the public survey was made of township 75, north of range 44, west of the fifth principal meridian in Iowa, and proper lines run and marked in the field, field notes and plats of which were duly returned to, and approved in the General Land Office. The survey made section 21 fractional, it lying on the Missouri river, and lot 4 was a subdivision, containing 37.24 acres. The meander line shown on the plat and the notes corresponded with the river bank.

On the 10th of October, 1853, Edmund Jeffries entered this lot, and on the 10th of June, 1855, the patent was issued to him describing the premises as lot 4, etc., with the usual addition, "according to the official plat of the survey of said land, returned to the General Land Office by the Surveyor General." At the time of the entry, the river bank

was "the same, or nearly the same," as shown on the plat and by the field notes. On the 14th of July, 1856, Edmund Jeffries sold and conveyed the land, describing it simply as "lot 4, in section 21, in Township 75, north, range 44 west of the fifth principal meridian." This deed ran to Joseph Still and Joseph I. Town.

On the 21st of September, 1857, Town conveyed with warranty to Thomas McCoid.

On the 16th of October, following, McCoid quit-claimed to Coleman.

On the 25th of May, 1858, Coleman conveyed with warranty to Mrs. Town.

On the 27th of April, 1859, Town and his wife conveyed with warranty to William S. Boin, jr.

On the 30th of May, 1861, Boin quit-claimed to Edward McBride.

On the 30th of September, following, McBride quit-claimed to Schoville.

Schoville having died on the 14th of August, 1878, on the 22nd of March, 1888, his widow and heirs quit-claimed to appellee.

On the 9th of March, of the same year, Still quit-claimed to Tower, who on the 28th of March conveyed to the appellee.

About the time of the entry by Edmund Jeffries, along the whole length of the north line of the lot, land was formed and thereafter continued to form until 1877; so that in that year, north of the original meander line and between the east and west lines of the lot extended north, a

tract of more than forty acres, was formed by accretion to said lot. This new land was so formed by natural causes; that is to say, by the operation of the current and waters of the river, washing and depositing against and upon the north line of the lot, earth, sand, and other material; and the waters of the river receded therefrom, so that the new land became high and dry above the usual high water mark; and this process went on so slowly that it could not be observed at any moment of time, but at intervals of some three, four or six months it could be discerned by the eye. In 1877 theMissouri suddenly changed its course above the point referred to, and cut for itself a way east of the tract, so as to throw the premises west of the river.

The appellee claims to own the forty acres of new land, by virtue of the conveyances to it, on the ground that they are a part of the lot 4, having been formed by accretion within its established boundaries.

When it became seized of this land, the appellee entered into the same, and projected the enterprise of redeeming these and adjoining lands and improving them, so that they would be useful for railroad and manufacturing purposes; and to this end has expended over $20,000.

In the summer of 1888, one Counzeman and others, without authority of law and with full knowledge of the appellee's plan and purposes, entered on this forty-acre tract of new land, and has quit-claimed a part of it to the appellant, who will unless restrained by injunction enter into the same and dispossess the appellee and defeat its plans. He is insolvent, and unable to answer the damages

which appellant will sustain if he be permitted to do so.

The prayer is for an injunction restraining the appellant from intermeddling with the land and for a decree declaring that the new land formed by accretion became a part of lot 4, and by that description the title thereto has become vested in the appellee.

The contention of the appellant is, that Edmund Jeffries' conveyances to Still and Town, by the description "Lot 4," passed the title to the land, as it was at the date of survey and not at the date of the deed, thereby excluding the new land formed after the survey; and also that, as while the several successive grantees held the title, accretions were formed of greater or less extent which did not pass by their respective deeds, the title to the same has not come to the appellee.

FIRST POINT.

The allegations of the bill are full and precise, showing that the new lands are accretions to those originally purchased by Edmund Jeffries from the United States. It is not amiss to repeat the rule of law, familiar as it is, governing the ownership of accretions. It is stated in a few words by Mr. Justice McLean, speaking for the whole court, in New Orleans vs. United States 10 Pet. 662, 717.

"The history of the alluvial formations by the action "of the waters of this mighty river, is interesting to the "public, and still more so to the riparian proprietors.

"The question is well settled at common law, that the "person whose land is bounded by a stream of water, shall "still hold its course by the same boundary, including the

"accumulated soil. No other rule can be applied on just "principles. Every proprietor whose land is thus bounded, "is subject to loss, by the same means which may be added "to this territory; and as he is without remedy for his loss "in this way, he cannot be held accountable for his gain."

And in Banks vs. Ogden, 2 Wall., 57, 67, Mr. Chief Justice Chase says:

"The rule governing additions to land bounded by a "river, lake or sea, has been much discussed and variously "settled by usage and by positive law. Almost all jurists "and legislators, however. both ancient and modern, have "agreed that the owner of the land thus bounded is en- "titled to these additions. By some, the rule has been vindi- "cated on the principle of natural justice, that he who sus- "tains the burden of losses and repairs imposed by the "contiguity of waters, ought to receive whatever benefits "they may bring by accretion; by others, it is derived from "the principle of public policy, that it is the interest of the "community that all land should have an owner, and most "convenient, that insensible additions to the shore should "follow the title to the shore itself.

"There is no question in this case that the accretion "from lake Michigan belongs to the proprietor of land "bounded by the lake. The controversy turns on owner- "ship."

Like expressions are found in many other judgments of the courts, but no good purpose will be served by referring to them.

SECOND POINT.

It is suggested that the rule is not applicable to lands bordering on the Missouri river, because of the peculiar character of that stream and the land through which it flows. It is matter of common knowledge that the current is very rapid, and that the lands it runs through are a soft,

sandy loam, which are not protected from the action of the water, either by rocks or the roots of trees. And this the more, because the course of the stream is very tortuous. The rapid current in many places strikes directly against the bank and cuts it away, sometimes in large bodies, and makes for itself a new course. The earth thus removed is almost at the same time deposited elsewhere, making new land almost as rapidly as the former bank was swept out. This is as strong a description of the conditions as we are able to give. And because of these conditions the suggestion is, that the ordinary rule as to accretions does not apply here.

But an examination of the adjudged cases shows that the law of accretions has been applied to the same conditions elsewhere.

Saulet vs. Shepherd, 4 Wall., 502, was an action involving the title to alluvion formed by the action of the waters of the Mississippi at New Orleans, and the diagram given at page 503 shows that a very large tract of land, much larger than we have here, had been formed against the bank as it was when the title was originally acquired.

The County of St. Clare vs. Livingston, 23 Wall., 46 involved the right to alluvion formed on the same river opposite St. Louis, and the changes of the bank were shown to be very rapid.

These cases are sufficient for our present purpose. They show that the law of accretions is applicable to lands along the Mississippi, where the conditions are much the same as on the Missouri. It is doubtless true that the

changes are greater and more rapid in the latter region than in the former; but such differences cannot be suffered to abrogate the rule of law.

And for this we have the distinct expression of the Supreme Court in Jones vs. Soulard, 24 How., 41. In 1812, the premises were a part of an island in the Mississippi, west of the main channel, opposite St. Louis. Since 1840 they had become connected with the Missouri shore by filling up the intervening channel. In 1809, St. Louis was incorporated, and in 1812 Congress confirmed to the inhabitants the lots claimed by them, and directed the out-boundaries of the town to be surveyed, and enacted that unclaimed lots be reserved for schools. In 1824 a further act was passed for the survey of the vacant lots so reserved for schools, and in 1856 this survey was made. In 1831 Congress relinquished to the state all the lots reserved for schools to be sold as provided by the legislature. In execution of this power in 1833 the legislature erected all the inhabitants of St. Louis into a corporation, in which was vested the title to all the lots reserved, and this title came to Soulard, the plaintiff below.

The defendant claimed title, first under a pre-emption entry of Duncan, which was set aside; and secondly, under an act of the legislature of Missouri, transferring the title to the city of St. Louis, which conveyed to Jones, the defendant below.

The question was, whether the island being within "the out-boundary" of the city, was reserved for schools and the title passed to the school corporation. The court held that the out-boundary was the middle of the main

channel of the river, which brought the island within the town.

Mr. Justice Catron uses these terms in the opinion:

"The expression used in designating boundary on the "closing line in the charter, is as apt to confer riparian "rights on the proprietor of the tract of seventy-nine acres "as the call could well be, unless the last call had been "for the middle of the river."

In the course of his opinion, he considers the question whether the rule as to riparian rights applies to so great and public a water-course as the Mississippi is at the city of St. Louis; and on that subject he says:

"The land grant to which the accretion attached has "nothing peculiar in it to form an exemption from the "rule; it is an irregular piece of land, of seventy-nine "acres, found vacant by the surveyor-general, and surveyed "by him as a school lot, in conformity to the act of 1812.

"The doctrine, that on rivers where the tide ebbs and "flows, grants of land are bounded by ordinary high-"water mark, has no application in this case; nor does "the size of the river alter the rule. To hold that it did, "would be a dangerous tampering with riparian rights, "involving litigation concerning the size of rivers as "matter of fact, rather than proceeding on established "principles of law."

If we turn from the adjudged cases to the principle stated by the Chief Justice in Banks vs. Ogden on which the rule rests, that the owner of lands bounded by waters, is entitled to accretions, we find it as applicable on the Missouri, as elsewhere. One of the reasons upon which the rule is vindicated, is, that as the owner of estates bounded by a river, must bear the loss of his land which may be caused by the action of the waters and the expense

of repairs to the shore without compensation, he ought to receive whatever additions may be made to his estate by the same causes. Why should not the rule apply when the losses and additions are very great and rapid? It is not the amount of losses or gains that determine the rule, but the reciprocal right and liability thereto. Because I may lose, I shall gain. You cannot say because I may lose in a year, or because I may lose an acre, therefore, I shall have additions made in the same time, or to the same extent ; but, if I lose in a month, or if I lose one thousand acres, yet I shall not have additions made in so short a time, or to so great an extent.

Or if we take the reason of the rule to be public policy, that, namely, "that it is the interest of the com- "munity that all land should have an owner, and most "convenient that insensible additions to the shore should "follow the title to the shore," its application here is as necessary as elsewhere. Greater confusion cannot be imagined than would be caused by departing from the old law. This case well illustrates the situation. This tract of new land, 40 acres in area, has been gradually formed since 1851. How much was made between that year and 1853? No one can tell. No one can say whether or not any was formed within those dates. How much was formed while Edmund Jeffreis owned the lot? The same answer must be given. And so you may go through the whole list of the successive owners. Who, then, owns the forty acres of new land? And the mischief is not as apparent here as in many other places. The river front of Omaha, has in twenty years undergone most extensive

changes. It has been cut away and reformed over and over. Are you to determine the ownership by any record of these successive changes year by year? There is no such record. The memory of river men cannot be relied upon, and there is no other means of learning the facts.

Property worth millions of dollars, great manufacturies, vast systems of railroads and terminal facilities, immense expenditures in grading, paving and building are involved in the question; if it be answered according to the contention of the appellant, the title to vast areas of land and what has been built thereon will be set afloat, so that no man can tell what he has. The mind shrinks at the terrible consequences of such a ruling. There never was a case calling more for the application of the rule which is dictated by public policy. We are not now discussing the sufficiency of the description of "lot 4" to pass the accretion. That must be the subject of separate examination. All we are here considering is the simple question whether the law of accretion as administered everywhere else, all over the world, under the civil as well as the common law, shall be departed from and set at naught in the valley of the Missouri. To that, it seems to us, but one answer can be given.

THIRD POINT.

But the question is put in another form. It is said that although, as a general proposition, the doctrine of alluvion applies to land along the Missouri, yet, taking the well-known character of the river and the allegations of the bill together, it is apparent that the lands here in

question were not formed by accretion, because they must have been formed more rapidly than that process admits. To state the contention shortly, it is that these lands were not formed by imperceptible degrees. This requires us to ascertain the meaning of the word "imperceptible."

The doctrine is stated by the civilians.

Gaius, who wrote his Institutes in the second century, says at paragraph 70 of Book II:

"Alluvion is an addition of soil to land by a river so " gradual, that in short periods the change is imperceptible, or to use a common expression, a latent addition."

Justinian states the doctrine as held at Rome three hundred years later, in these words (Lib. II, Tit. I, Sec. 20):

"That is said to be alluvion which is added so gradually that no one can judge how much is added at each " moment of time."

The development of the doctrine is apparent. In the second century, the Roman Jurist says that the addition must be so gradual that the change is not perceptible in short periods of time. In the fifth century it was said that the alluvion must be so gradual that one cannot judge how much is added in a single moment of time. The doctrine was imported into English jurisprudence by Bracton. He says in book II, chapter II:

"Alluvion is a latent increase, and that is said " to be added by alluvion, whatever is so added by degrees, that it cannot be perceived, at what moment of " time it is added; for although you fix your eye upon it " for a whole day, the infirmity of sight cannot appreciate " such subtle increments, as may be seen in the case of a " gourd and such like."

In several early books, the rule is stated in the same words. Callis on sewers, 24, 28, Dyer 328, Davis Rep. 59; 2 Ventr. 188. But no greater precision is found in the definition, than is given above.

Blackstone says (2 Comm. 262) "and as to lands "gained from the sea, either by alluvion, by the washing "up of said sand and earth, so as in time to make *terra* "*firma*; or by direliction, as when the sea shrinks back "below the usual water mark; in these cases the law is "held to be, that if this gain be by little and little, it shall "go to the owner of the land adjoining. For *de minimis* "*non curat lex;* and, besides, these owners, being often "losers by the breaking in of the sea, or at charges to keep "it out, this possible gain is therefore a reciprocal con- "sideration for such posssible charge of loss."

The learned counsel for the appellant relies upon Rex. vs. Yarborough, 3 B. & C. 91, S. C., 2 Bligh, N. S. 163. But that case does not assist us. The most that can be said of it, is that whether the accretion might be considered by the jury to be imperceptible, was a question upon the evidence of several witnesses who showed that the increment had been at the rate of from five and a half to ten yards a year, for twenty-six or twenty-seven years. The courts before which the case went, held that such rate of increase was imperceptible, but they were not called upon to say nor did they say that a more rapid rate would be perceptible. But in this case, Lord Tenterden uses an expression which justifies us in thinking that in his view, the question was, whether the accretion was imperceptible in

its progress, and not after a lapse of time. This is the idea of Justinian and Bracton.

In the Hull & Selby Railway Co., 5 M. & W., 329, Baron Alderson expresses the same. He says: "That which cannot be seen in its progress, is taken to be as if it never had existed at all."

In Scranton v Brown, 4 B. & C., 485, the right to land formed imperceptibly, was established; but there is nothing in the case to show the meaning of the word imperceptible. And this is true of all the other English cases, which have fallen under our eye. We submit therefore, that in England, the definition of accretion is addition to the estate lying upon the water formed so slowly, that its progress cannot be perceived; excluding the appellant's contention that the formation must not be discernible by comparison at two distinct points of time.

In the American cases, the same is true.

In New Orleans v United States, 10 Peters, 662, the accertion was formed between 1803, when Louisiana was purchased, and 1825, when the suit was brought; that is, in twenty-two years and at one place, it was 140 feet wide. (See page 669.) Nothing is said in the case upon the subject now being considered here.

In the county of St. Clare v Livingston, 23 Wall., 46, the reporter says, "the fact that the additions were making was perceptible at certain intervals, though the additions were too gradual to strike the eye as they were in the actual process of formation."

Mr. Justice Swayne, speaking for the whole court, after citing authorities under the civil and the common

law, and in this country, also says, "In the light of the authorities, alluvion may be defined as an addition to riparian land, gradually and imperceptibly, made by the water to which the land is contiguous. It is different from reliction, and is the opposite of avulsion. The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the progress was going on."

The changes which gave rise to the other cases in this court, were also very rapid, and yet the doctrine of accretion was enforced in them.

Schools v Risly, 10 Wall., 110.
Jones v Soulard, 24 How., 41.
Jones v Johnston, 18 How., 150.

In the courts of the states, the definition of accretion is substantially the same as that given by Mr. Justice Swayne.

In Halsey v McCormick, 18 N. Y. 147, Pratt, J., says:

"But to acquire title to land as alluvion, it is necessary that its increase should be imperceptible—that the amount added in each moment of time should not be perceived. When the change is so gradual as not to be perceived in any moment of time, the proprietor, whose land on the bank of a river is thus increased, is entitled to the addition."

In Mulry v Norton, 100 N. Y., 424, Ch. J. Ruger quotes with approval, Ang. on Tide-waters, as follows:

"The test of what is gradual as distinguished from what is sudden, seems to be that, though witnesses are able

to perceive from time to time that the land has encroached on the sea line, it is enough if it was done so that they could not perceive the progress at the time it was made."

In the case of the Trustees of Hopkins Academy v Dickenson, 9 Cush. 544, Ch. J. Shaw says on page 532,

"By alluvion, here, we mean such slow gradual and insensible accretion, that it cannot be shown at what time it occurred."

In Camden and Atlantic Land Co. v Lippincott, 45 N. J, L. 405, it appears that the increase between 1853 and 1880, was at some places, two or three feet, and at others, one hundred and fifty feet, and so gradual as not to be perceptible from day to day. Depue, J. defines the rule thus:

"The increase of land adjacent to the seashore, derived from alluvial deposits, happening so gradually, that the increase could not be observed while actually going on, although a visible increase took place from year to year, belongs to the owner of the land bounded upon the sea."

Expressions in nearly the same words, may be found in most of the judgments of the State courts, where the subject has been considered. No good purpose would be served by repeating them. The American definition is the same as the English and Roman—land to be accretion must have formed so gradually that the progress of the change could not be observed, although by a comparison at intervals of time it would be discerned.

For the purpose of convenient application of this rule, the allegations of the bill upon this subject will be collected here. At the time of the entry the meander line of the

left bank of the river was "the same, or nearly the same, as shown by the field maps and on the plat." About the time of the entry by Edmund Jeffries along and against the whole length of the north line of the lot, new land was formed and continued to form until 1877, at which time, north of the original meander line, and between the east and west lines of the lot, forty acres and more had been added by accretion. This process was so slow that its progress could not be observed at any time, but at intervals of three, four or six months, it could be seen that additions to the shore had been formed. The map attached to the bill shows that between 1851 and 1877, that is, in twenty-six years, the river moved north a mile.

The learned counsel for the appellant is not content to base his contention upon the allegations of the bill, but seeks to extend them by a statement of the character of the river. But the question here is not what changes the river has made elsewhere, or may make, but what changes took place at the point here in question, during the twenty-six years between 1851 and 1877. It is true that in the latter year the river made a very great and sudden change, but that fact does not justify the assumption that any change of like character took place during that time where the land here in dispute lies. Certainly, any such idea is entirely inconsistent with the positive allegations of the bill. All that the learned counsel says about the general character of the river and the land through which it flows is very well, if it is by way of caution against a too ready application of the doctrine; but it is without effect when

all the conditions required by the doctrine as defined in the civil and common law exist.

The opposite of accretion is avulsion ; and we are assisted in ascertaining the exact meaning of the former by that of the latter.

Gaius says (II, Sec. 71) : "But a parcel of your land swept away by a river and carried down to mine, continues your property." Identification is by this jurist made the test.

Justinian says (Lib. II, Tit. I, Sec. 21) : "But if the impetuosity of a river should sever a part of your estate and adjoin it to that of your neighbor, it is certain such part would continue yours." Not only identification, but the violence of the change, are made the tests here.

Bracton says (II, 2) : "But if the increment is not latent, but apparent, the contrary will result ; as for instance, the force of the stream has carried off some part of your meadow and joined it to the meadow of your neighbor, it is certain that it remains yours." Bracton follows Justinian in his statement.

And Blackstone says (2 Comm., 261) : "But if the alluvion or dereliction be sudden and considerable, in this case it belongs to the King ; for, as the King is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry. So that the quantity of ground gained, and the time during which it is gaining, are what make it either the King's or the subjects' property."

The English Commentator distinctly makes the suddenness and extent of the change the tests. In England

and in this country, as we have seen, the question has turned upon whether the change was discernible during its progress. And it is only expressing the same idea in other words, to say that it is whether it is sudden. It can not be said that a change is sudden, the progress of which can not be seen, and therefore, it is imperceptible within the meaning of that word in this connection. If the change go on for three months, and not until the end of that time, it be possible to see that an addition has been made to the shore, certainly the change has not been sudden ; and, therefore, it is imperceptible.

There is another view to be taken of the matter, which is suggested by the learned counsel's pretense of hardship in the application of the doctrine of accretion to lands along the Missouri. The hardship, if there be any, is that one man loses, while another gains. That is true wherever the rule is applied, and is of the nature of property so situated. But if what one gains can be shown to be what the other has lost, the rule will be qualified as is stated by the Roman jurists. If the gain and loss can not be identified, there can be no hardship between the two owners. Identification must be shown to justify the retaining of the property as it was before the change. And identity can not in the nature of things be shown, unless the change be sudden, and wrought by the impetuosity of the river. The allegations of this bill clearly exclude such idea.

FOURTH POINT.

We come now to the question, what passed by the

description "lot 4" in the patent, and the successive deeds under which the appellee claims?

Let us in the first place, consider the matter in the simplest aspect ; that namely, of the entry by Jeffries and the patent to him. What did he take? When in 1851, the township was surveyed, the meander line, as marked on the the plat, ran along the river bank. So the bill alleges. But it is not said that it was in precisely the same place when the entry was made; the allegation admits of the supposition that between the time of the survey and the time of the entry some land had been formed; and because of the indefiniteness of the allegation, the contention of the appellant is that such was the fact. Let it be admitted. Upon this fact the appellant's contention is grounded, that the grant by the government of "lot 4" did not pass the title in the new land to Jeffries, but that it remained in the United States. The appellee's contention, on the other hand is, that the description "lot 4," gave the river as the north boundary and passed the government title to any new land that may have been formed. That is the issue; it is vital.

1. The bill shows that the patent granted "lot 4," etc., "according to the official plat of the survey of said "land returned to the general land office by the Surveyor General," and that plat showed the river as the north boundary of the lot. The general rule is well stated in Fox vs. Union Sugar Refinery, 109 Mass., 292, that:

"Where a plan is referred to in a deed, as containing "a description of an estate, the courses, distances and "other particulars, appearing upon the plan are to be "as much regarded in ascertaining the true description of

"the estate, and the intent of the parties in making it, as "if they had been expressly recited and enumerated in "the deed."

The rule is familiar and needs no authority to support it. The case cited also holds that the rule is applicable, not only to the principal subject matter of the grant, but also to any rights incidental thereto; such as rights to a way or street, or as here, to the riparian rights of the owner of the estate.

If this general rule is applicable to government lands bounded by the Missouri River, as the same are surveyed and platted under the acts of Congress, then it follows necessarily that the patent passed to Jeffries the title of the lot, not only as it was at the time of the survey, but also at the date of the patent; that if any accretions were formed between those dates, the government did not retain them or an interest therein.

2. The question then arises whether in the acts of Congress, providing for the survey and sale of the public lands and the proceedings in execution of those acts, any different rule has been established. We submit that here, as well as elsewhere, the rule is not only not abrogated, but is enforced in express terms.

Statutes on the subject were passed in 1796, and, with slight amendments, remain as originally enacted. (R. S., Sec. 2395 et seq.)

They provide that "the public lands shall be divided "by north and south lines * * * and by "others crossing them at right angles, so as to form town-"ships of six miles square; unless * * * "when the course of navigable rivers may render this im-"practicable."

It is further enacted that "the boundary lines actually "run and marked in the surveys, returned by the sur- "veyor-general, shall be established as the proper bound- "aries of the sections, or subdivisions, for which they "were intended, and the length of such lines, as returned, "shall be held and considered as the true length thereof. "And the boundary lines which have not been actually "run and marked, shall be ascertained by running straight "lines from the established corners to the opposite corre- "sponding corners; but in those portions of the fractional "townships, when no such opposite corresponding corners "have been or can be fixed, the boundary lines shall be "ascertained by running from the established corners due "north and south, or east and west lines, as the case may "be, to the water course."

The rule there established, applied here, works thus: Section 21 being fractional by reason of the river cutting it on its north side, the east and west side lines of what is now lot 4 are to be run north to the river. No provision is made for running the north boundary of the lot, but the river forms its boundary without any line run along it. It is indisputable that in this particular class of cases the river is the boundary, just as a section line fully run, marked and platted, is the section boundary. And as the law requires the surveyor to make his plats showing the river as the boundary, patents referring to the plats make them a part of the description, of which one call is the river. To refuse to follow the general rule is to defeat the terms of the act.

3. But it may be said that, applying the rule in this way, may give the purchaser more land than he pays for. But that may be so in other cases. For instance, it is provided that "townships shall be divided into sections,

containing, as nearly as may be, six hundred and forty acres each." Here words are used which anticipate that some sections may contain more than the full number. But we have more than this. It is expressly provided that "any excess or deficiency of any section or half section shall be noted by the surveyor, and added to or deducted from certain ranges of the township, and these sections and half sections are to be sold as containing the number of acres expressed in the returns and plats, and all others as containing the complete legal quantity." So that a quarter section actually containing 165 or a quarter quarter section, 43 acres, is sold as 160 or 40 respectively, and paid for as such. As this is expressly provided for in the statute, we may reasonably say that the same result, happening accidentally, is not open to objection.

4. The statutes further provide that fractional sections shall be subdivided under rules and regulations, to be prescribed by the Secretary of the Interior. These rules provide "that the subdivisional lines of fractional quarter sections should be run from points on the section lines, intermediate between the section and quarter-section corners, due north, south, east or west to the lake or water course * * which renders such section fractional."

This is but a repetition of the statute and the result is the same.

Provision is also made in the Secretary's regulations for meandering the river, and that "meander lines should "not be established at the segregation line between dry "and swamp or overflowed lands, but at ordinary low "water mark of the actual margin of the river." This

distinctly makes the river the boundary. This has been the subject of explanation in Railroad Co. vs. Schurmeir, 7 Wall, 272.

Mr. Justice Clifford speaking for the whole court said :

"Meander lines are run in surveying portions of the "public lands bordering upon navigable rivers, not as "boundaries of the tract, but for the purpose of defining "the sinuosities of the stream, and as the means of ascer- "taining the quantity of the land in the fraction, subject "to sale, and which is to be paid by the purchaser."

"In preparing the official plat from the field notes, "the meander line is represented as the border line of the "stream, and shows to a demonstration that the water "course and not the meander line as actually run on the "land, is the boundary."

Upon these considerations, we submit that the general rule stated above is applicable here, and that the patent to Jeffries describing the premises as "Lot 4 of fractional section 21, etc., according to the official survey. etc.," passed to him the title to the accretions which had been formed on the day of its date, that is to say, June 10, 1855.

5. The matter may be considered in another aspect with the same result. Let the conditions be repeated. In 1851, when the survey was made, the river ran as shown on the plats along the north boundary of "Lot 4," making its area 37.24 acres. In 1853, Jeffries entered it at the Land Office. Between 1851 and 1853 accretions had been formed; how much we cannot know. Did Jeffries take the new land by his entry, or did the government retain it? The precise question seems never to have been presented to the courts, but we think the analogies of the cases support our contention.

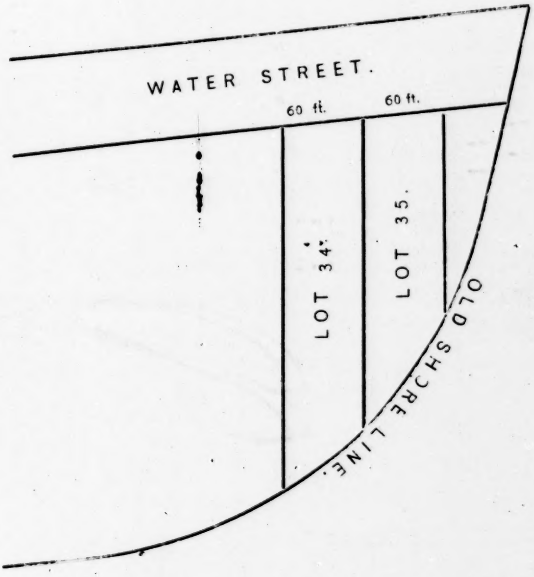
The case last cited was shortly this: The premises were in St. Paul. The government surveyor, surveying section 5, made a lot number 1, and ran the meander line so as to give 9.28 acres as its area. Between the line and the Mississippi river, there was first a slough about twenty-eight feet wide, through which in medium water, the water flowed; but in low water there was no flow; beyond that was a bar. This parcel was 2.78 acres. The question was whether the purchaser of the lot took this last named parcel. The court held that he did. It so held on the ground that the acts of Congress made the river the boundary.

Now, if land on the river side of the meander line, although not surveyed, is conveyed by the description lot 1, why should not land formed after the survey and before the purchase, pass by the same description?

Almost this very question was decided in Jones vs. Johnston, 18 How., 150.

The case is not very clearly stated, but for our present purpose it is enough to say that Robert A. Kenzie owned a tract which bordered on lake Michigan. In February, 1833, he laid it out as an addition to Chicago and filed his plat in the Recorder's office. This showed Water street, and also two lots, 34 and 35, whose north lines were on that street. The boundaries of these two lots were not run, but they were described each as sixty feet on Water street, which was the north boundary, and with side lines dropped from fixed corners on the street, at right angles with the same, until they intersected with the

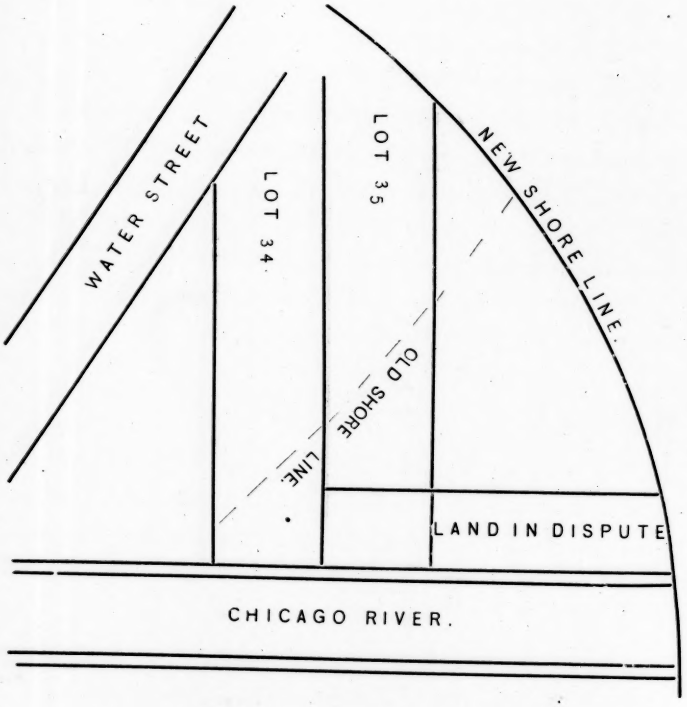
lake, which cut them on the south and east. This diagram shows their situation before the accretions were formed:



February 25, 1833, Kenzie conveyed lot 35 to John H. Kenzie, who, on the 15th of September, 1834, conveyed to Jones, the defendant.

October 22, 1835, Kenzie conveyed lot 35 to Johnston, plaintiff. New land was formed between the making of the plat and the deed to John H. Kenzie and that to Johnston, filling up the triangle shown on the second plat, and

also making new land to the distance of 1,200, feet as shown on this diagram:



Jones, the owner of lot 34, claimed the triangle and also the land formed east of it. The court held that lot 35 was to be extended south to the lake, and that cut 34 from the accretions claimed by Jones except the triangle, and that the situation was to be taken as at the making, not of the plat and survey, but of the deed to Johnston.

Mr. Justice Nelson says:

"Now, in order to determine what land was conveyed " to the plaintiff by his deed of the 22d of October, 1835, all " that was necessary was to locate the lot upon the ground " in conformity to the description at that date. The calls " in the deed having reference to the plat, furnished the " necessary data for the location. There was the fixed " line north on the ground, the lake, a natural object " south, and the lot enclosed between two lines extending " at right angles from the corners on Water street to the " lake.

" If the call for the southern boundary, instead of be- " ing a lake, which is a shifting line, had been a perma- " nent object, such as a street or a wall, there could not " be two opinions as to the location. And yet the water " line, though it may gradually and imperceptibly change, " is just as fixed a boundary in the eye of the law as the " former. I speak not now of sudden and considerable " changes, which are governed by different principles."

This gave Jones the accretions made within his side lines dropped from Water Street to the lake; and it also gave Johnston the accretions within his side lines, described in the same manner, and cut off Jones from what he claimed in the suit. The situation of the land was taken at the date of Johnston's deed, and gave him not only land which had been formed at the date of the survey, and shown on the plat, but also what had been formed after the survey.

That is what we claim here. The side lines of lot 4 are to be extended to the river—not as the river ran at the time of the survey, but as it was at the date of the patent; and all land at the latter date between the side lines and between the quarter section line on the south and the river on the north were conveyed to Jeffries by the patent.

Craut vs. Crawford, 18 Iowa, 594, decides almost precisely the question before us.

The *locus in quo* was in a fractional section 17; plaintiff claimed title to the same by deed from the County Judge, as part of swamp or overflowed lands. If it was swamp land, he was entitled to recover. The defendant denied that it was swamp land, and claimed the same as the owner of the east fractional half of the southwest quarter of section 17, which bordered on the Mississippi, and was divided by the government surveys into lot 3, containing thirty-one and eighty-five hundredths (31.85) acres, and lot 4, containing thirty-four and forty hundredths (34.40) acres. The *locus in quo* was connected with and passed to lot 4, and lies between the meander line and the river, and directly with the defendant's other land.

Judge Dillon delivered the opinion of the court. In the course of which, he said:

"Upon the whole evidence, as it now is before us, we "are of the opinion that, in selling the fractional 80 above "named, the government intended to sell all the land to "the river; whoever bought it became a riparian proprie- "tor on the river. At the time of the survey by the "United States, which might have been in a high stage "of water, there was not enough land to make a full 80 "or a full 40 acre tract. For it has been the settled "policy of Congress to survey the public lands in square "figures, and to extend the subdivisions authorized by "law as far as possible in square figures to the lowest de- "nomination. Brown's Lessee vs. Clement, 3 How. "(U. S.) 663. And see act of Congress, directing bound- "ary lines to be extended 'to the water course.' Act "February 11, 1805, Sec. 2, 2 Stat. at Large, 313; Act "1796, Id., 464.

* * * * * * *

"As we understand the testimony, the government "plat of the survey referred to in the patent represented "the fractional eighty, now owned by the defendant, and "which, we hold, embraces the *locus in quo*, as bounded "upon the river. It showed no intermediate tract be- "tween that and the river. There was no such tract re- "served. The plaintiff's theory seems to be that defendant "is only entitled to the quantity of land called for in the "patent and shown on the plat; that the grant is limited to "the meandered line. This is an error. The grantee "gets all down to the river, be it more or less. The line "is meandered chiefly to obtain the quantity; and the "meander line is not a line of boundary. As above re- "marked, the government plat shows defendant's land to "abut upon and to be made fractional by the water "course, and a grant of it by the government will at least "extend to the water, so as to give the grantee, under all "circumstances, the full benefit of the river front. Once "a riparian proprietor, always so, because as accretions, "or newly formed ground, belong to such proprietor, *jure* "*gentium*, and because the government cannot afterwards "grant such accretions, or newly formed ground, to "another. The law is wise and just. If the action of "the river had gradually worn away the defendant's land, "after the purchase from the United States, the loss "would have been his.

"To compensate him for risk of loss in this manner, "as well as to preserve to him the benefits of his water "front, the law gives him (see authorities below cited) "the advantage of any gain by accretions or alluvial de- "posits. If the *locus in quo* was in existence when the "land was surveyed and sold by the United States, it "not being reserved, and the official plat showing the "tract now owned by the defendant to extend to the "river, no right to or over any of the ground could "subseqnently be sold by the government, nor acquired "by the plaintiff, not even though the *locus ni quo* be sit- "uated between the river and the meandered line of the "original survey.

"If, on the other hand, the *locus in quo* has been

"gradually formed since the survey and sale, this incre-
"ment belongs to the defendant by virtue of the principle
"that ground gained by alluvion belongs to the owner of
"the adjoining land."

We pass now from the case considered as between the government and Jeffries, to that between the several successive grantees and the plaintiff. All of them in their successive deeds, described the lands conveyed, as "lot 4." The contention of the defendant is, that this description conveys the lands as they were at the entry, or at most at the date of the patent; and as the allegation of the bill admits the supposition even if it does not state the fact, that between July 14, 1856, the date of Jefferis' deed to Still & Town and September 21, 1857, the date of Town's deed to McCoid, accretions were formed; the description was not adequate to pass to McCoid this new land, and therefore, all formed afterwards belonged to Still & Town, and not to McCoid.

Or, if in point of fact, no accretions were formed between those dates, while some of the successive grantees held the title, accretions must have been formed which did not come to us by the description.

We admit that this must be correct, if the words "lot 4" did not describe not only the land as it was at the time of the patent, but also all that had been formed between the side lines of the lot protracted to the river.

1. The question what passed by the description "lot 4" may be resolved by ascertaining what the successive grantors intended to convey—for all questions of this sort are simply those of intention; and all rules for the con-

struction of deeds are framed to ascertain the intention of the parties.

2. If there are any doubts respecting the description of the premises, whether by it the parties meant to convey land as it was at one time or at another, they are dispelled by noticing the construction manifestly given to it by the parties. This is an aid which may always be called in when the meaning of a contract is ambiguous.

Steinback vs. Stewart, 2 Wall. 566, 576.

What have we here? When any one of these grantors made his deed, he ceased to claim not only what was originally lot 4, but all accretion thereto. In this long period of time, extending from 1854 to the present hour, no one of these parties has ever set up any claim to these premises. If they did not suppose that by these words they had conveyed their whole interest, they would have spoken; their silence justifies us in believing that their intention was to pass the lands to the river.

3. Another mode of ascertaining the meaning of parties to deed is a reference to the circumstances existing at the time of its execution. The rule is elementary, "that "the best and surest mode of expounding an instrument, "is by referring to the time when, and circumstances "under which it was made."

Smith's Com. Const., Sec. 512.

Sheets vs. Selden's Lessee, 2 Wall., 177, 187.

People vs. Dayton. 55 N. Y., 367, 375.

When, for instance, McCoid conveyed lot 4 (assuming

that at the date of the deed to him he took to the river, what were the conditions? On the north line was the river which was gradually adding to the land he owned; how much had been formed during that time, he could not certainly know; he sold the lot without reserve. The conviction is irresistable, that he understood the descriptive words to pass all lands to the river.

4. There is still another rule which supports our contention; it is that whatever "is essential to the beneficial " use and enjoyment of the property designated is, in the " absence of language indicating a different intention on " the part of the grantor to be considered, as passing by " the conveyance."

Sheets vs. Selden's Lessee, supra.

The grant of a tract lying on a river passes certain valuable rights without which the grant may be of little value; among which are those of wharfage and landing, called riparian rights. To this class, belongs the further riparian right to accretion. Before the deed of one of these grantors, the lot 4 was a water lot to which these rights attached. While he owned it, new land of greater or less width was formed, and yet when he conveyed this part of a fractional section he used the former description by which he took those rights and which made the estate valuable. He must certainly be taken as intending to pass them to his grantee.

5. When a name has become impressed on an estate as here, "lot 4," a conveyance by such description will pass all that is implied thereby, although the quantity may exceed that stated in the conveyance.

Hathaway vs. Power, 6 Hill, 453.

And with the estate will pass all incidental rights.

Varick vs. Smith, 5 Paige, 137.

S. C., 9 Ib., 547.

Fox vs. Union Sugar Refinery, Supra.

And under the name will also pass all additions which have been made thereto.

Lamb vs. Rickets, 11 Ohio, 311.

Approved in Jones vs. Johnston, Supra.

6. And a conveyance of land by the subdivision of the public surveys makes the plats, monument and survey, part of the deed by virtue of the principle of reference.

Powers vs. Jackson, 50 Cal., 429, is an interesting illustration of this rule. It was ejectment to cover a belt fourteen feet wide on the south side of lot 1 in Elliot's addition to Woodland. Elliott's plat laid out lot 1 with the dimensions thereof. Adjoining it on the south was lot 4. The map had this description of the addition.

"This addition is situated on the following described "land viz: Commencing at the northwest corner "of the east half of the southeast quarter of section thirty-"two, township ten, north range twenty-two, east Mount "Diablo base, ad meridian running thence south eighty "rods, etc."

"It appeared from the testimony and admissions of "of the parties, that Elliott, when he made a survey of "the plat, planted a stake for a starting point, fourteen "feet north of the corner of the northeast quarter of the "southeast quarter as fixed by the United States survey,

" and made a survey of the plat from such stake, so that " the plat was carried fourteen feet north of the " line of the United States survey. The defendant, in " 1872, received a deed of lot 4 from Messinger, described " as lot 1 was in the deed to Giddings, took possession " according to Elliott's survey, which carried lot 4 " fourteen feet onto lot I, according to the United States " survey. The court gave judgment for the defendant " and the plaintiff appealed."

* * * * * * *

By the court:

" In case of a conveyance of land being described as " being a township or a subdivision of a township, the " actual survey and monuments of the United States sur- " veyor are referred to on the face of the deed, since " there is and can be no 'township' on the public " lands of the United States, except such as has thus " been actually surveyed and marked. The deed from " Messinger to Giddings, therefore (if the map referred " to and the note on the margin thereof be incorporated " in the deed) contains a sufficient description. It refers " to physical objects on the surface of the earth, to-wit, " the township or section lines as marked by the gov- " ernment surveyor. From these may be ascertained " the point of commencement of the survey contained in " the marginal note, and from this, as an initial point, " the courses and distances mentioned in the marginal " note will include a tract of land.

" No stakes or monuments, other than those of the " government survey, are named or referred to in the con- " veyance from Messinger to Giddings. Stakes, by whom- " soever placed, cannot therefore be used to control the " courses or distances of the description in the conveyance. " To permit this would be to permit the deed to be con- " tradicted, whenever the location of the stakes did not " agree with the termini of the lines mentioned in the " deed. The question here is not whether in locating a " tract of land, stakes or monuments, named or referred " to in the deed, shall control courses and distances also

"mentioned in the deed. In such cases the stakes or "monuments will ordinarily be regarded as fixing the "true points."

Applying the principle of that case, the words "Lot four of fractional section twenty-one," etc., make the official plat and survey returned to the general land office by the surveyor-general, a part of the description of the premises in the deed. We have seen that this plat gave the river as the boundary, the side lines of the lot being extended thereto.

It was a shifting boundary, but a certain legal boundary wherever at any moment it was. It followed the river to whatever place the waters receded.

7. There is another controlling reason which supports our contention, and that is the principle of convenience and public policy, which for another purpose we have illustrated above. Upon these grounds we submit that the title to the land, including that in dispute, which has been formed by accretion to lot 4, as originally surveyed, has become vested in the plaintiff, and it is entitled to the relief prayed against the defendant, who has no title.

FIFTH POINT.

The strength of the appellant's position is drawn from the case of Granger vs. Swart, 1 Woolw., 88. If that case supports his contention, it is because in his charge to the jury Mr. Justice Miller treated the meander line as the boundary at the time of the entry. If that was intended to be the ruling, it is clearly overruled by the later case of Railroad Co. vs. Schurmeir, supra.

But the learned Justice did not mean to assert the rule attributed to him. Undoubtedly the second alternative which he puts was correct and supports us to a certain extent. It is said if the land was formed after the entry, the patentee takes it. And his grantee takes it also. This shows that the deeds describing the premises conveyed as "Lot Four," &c, pass the accretions formed while any grantor owned the shore. But it is the other alternative from which the appellant claims advantage.

The case evidently is not fully reported. The question was not whether the land was formed between the survey and the entry, but whether in that particular case upon the evidence, the government, when it allowed the entry, expressly made the meander line the boundary. And that was a question proper to be submitted to the jury. Here there is no room for question on that point, for we have nothing but the bare facts that the entry was made describing the land as Lot Four, and that the actual bank at that time was the same or nearly the same as the meander line.

The same is true of the two Nebraska cases cited by the learned counsel.

We submit that the Circuit court rightly overruled the demurrer, and made a decree according to the prayer of the bill, and that the appeal should be dismissed.

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